NO. 88-1793

Supreme Court, U.S.
FILED
APR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARGARET ALLARD, AS NATURAL TUTRIX OF THE MINORS, JAMES ALLARD AND CYRILLA ALLARD

PETITIONER,

v.

MARK F. BIBEAU, MR. & MRS. ROBERT E. BIBEAU, MR. & MRS. DAVID SCHROEDER, INDIVIDUALLY, AND AS PARENTS AND/OR GUARDIANS OF DAVID SCHROEDER, DIVERSIFOODS, INC., BURGER KING CORPORATION, CHART HOUSE, INC. AND ALLSTATE INSURANCE COMPANY

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF LOUISIANA

Respectfully submitted,
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FRANK C. DUDENHEFER, JR.
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QUESTION PRESENTED FOR REVIEW

Whether procedural due process, required by the 14th Amendment, is violated when a party's right of access to the Court is denied by a summary reversal and dismissal from a court of no appeal and with no reasons given.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO.

MARGARET ALLARD, AS NATURAL TUTRIX
OF THE MINORS, JAMES ALLARD AND
CYRILLA ALLARD

PETITIONER,

v.

MARK F. BIBEAU, MR. & MRS. ROBERT
E. BIBEAU, MR. & MRS. DAVID
SCHROEDER, INDIVIDUALLY, AND AS
PARENTS AND/OR GUARDIANS OF DAVID
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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Louisiana. That judgment was filed with-out written reasons which were timely requested by Petitioner. Because there is no meaningful method of challenging judgments of the Supreme Court of Louisiana, summary reversals and dismissals granted by that Court effectively eliminate parties' rights of access to the courts without affording any protections. In this case, the Supreme Court of Louisiana took this action despite the fact that all inferior courts,

including the 24th Judicial District Court and the Louisiana 5th Circuit Court of Appeals, had denied the defendant's Motion for Summary Judgment noting that numerous material facts existed to warrant a trial on the merits. Despite that fact, the Court issued no reasons supporting its dismissal; therefore, no rebuttal could be fashioned even if a process for meaningful challenge existed. In Louisiana, there is no appeal nor any effective method of challenging adverse rulings from the Supreme Court of Louisiana decisions. As a result, petitioner's right of access to the Courts has been abridged without the protections afforded to her by the 14th Amendment to the Constitution.

RELEVANT OPINIONS AND ORDERS BELOW

A) 24th Judicial District Court's Order granting Petitioner a new trial dated May 4, 1988 "Appendix A".

B) Louisiana 5th Circuit Court of Appeals Order and Opinion granting Petitioner Motion for Summary Judgment dated June 30, 1988 "Appendix B".

C) Louisiana's 5th Circuit Court of Appeals Order and Opinion setting aside its judgment of June 30, 1988 and Petitioner's Petition for New Trial dated September 8, 1988 "Appendix D".

D) Louisiana Supreme Court Order granting Respondent's Motion for Summary Judgment dated November 28, 1988 "Appendix E".

E) Louisiana Supreme Court Order denying Petitioner's Petition for Rehearing dated January 13, 1989 "Appendix F".

JURISDICTION

The decision of the Supreme Court of Louisiana reversing the Louisiana 5th Circuit Court of Appeals and

granting respondents' Motion for Summary Judgment was entered on November 28, 1988 "Appendix E". Petitioner then filed a timely Application for Rehearing. "Appendix G". The Louisiana Supreme Court's denial of the Petitioner's Petition for Rehearing was entered on January 13, 1989 "Appendix F". This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVES

LSA-C.C.P. Art. 968.

> "EFFECT OF JUDGMENT ON PLEADINGS AND SUMMARY JUDGMENT. Judgments on the pleadings, and summary judgments, are final judgments and shall be rendered and signed in the same manner and with the same effect as if a trial had been had upon evidence regularly adduced. If the judgment does not grant mover all of the relief prayed for, jurisdiction shall be retained in order to adjudicate on mover's right to the relief not granted on motion.
>
> "An appeal does not lie from the court's refusal to render any judgment on the pleadings or summary judgment."

U.S.C. Const. Amend. 14, Sec. 1.

> "AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.
>
> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND FACTS

Following the celebration of Cyrilla Allard's thirteenth birthday, Cyrilla Allard and her then four-year-old brother, James, left their home at approximately 4:30 p.m. on April 14, 1985, for the Burger King outlet located a block and a half away. They were accompanied by four of Cyrilla Allard's friends, all approximately the same age as Cyrilla.

These companions were Shawn Martin, Natalie Turner, Vicky Roche, and Melody Neff. Their intention was to use the pay telephone at the rear of the Burger King outlet.

They were thus Burger King's invited patrons, since Burger King receives a commission from South Central Bell on account of all local and long-distance calls originating from those pay telephones. The pay telephones are located at the rear of the Burger King outlet, immediately adjacent to the drive-up service lane and speaker system used by Burger King to receive drive-up orders. Directly across from the telephones are additional parking spaces provided for Burger King customers. Within several feet of these telephones is the store's rear entrance.

When they arrived at the Burger King, Cyrilla Allard called her aunt and Natalie Turner called her parents, to make arrangements for Natalie Turner to spend the night at Cyrilla's home. While these calls were being placed, Melody Neff took James Allard into the restaurant. While inside,

Melody Neff's attention was drawn to the defendants, Mark Bibeau and David Schroeder, both of whom appeared drunk.

Melody and James then walked outside, to the rear of the Burger King store, and joined the group. Vicky Roche, another friend, was standing near the phone waiting for Cyrilla to finish her call when she noticed David Schroeder exiting from the rear of the Burger King along with Mark Bibeau.

One of the girls acknowledged David Schroeder's presence, but he did not respond. Mark Bibeau did not respond either, but stood in the parking lot staring at the girls. The Defendants then started yelling verbal insults such as "Fuck you," "I'm gonna fuck you bad," and "Bunch of bitches". These insults attracted the attention of neighbors and passersby alike. In all, this verbal assault continued approximately 20 minutes. Although this lengthy alterca-tion attracted the attention of many people, the employees of Burger King did not respond in any manner.

Being concerned, the girls, along with James, left the parking lot area, walking in the direction of Division Street. At the same time Mark Bibeau and David Schroeder entered their truck and began racing the engine loudly. The Defendants left the parking lot, Mark Bibeau driving, and followed the girls as they exited the lot and traveled down Division Street. Bibeau and Schroeder continued to shout similar obscenities, racing the truck forward and then stopping.

Everyone started running for cover. The Defendants sped forward in the truck, chased 4 year-old James onto a lawn and struck him with the vehicle, knocking him to the ground. The Defendants then backed the truck up and ran over James a second time, thereafter fleeing the scene.

James sustained profound injuries which produced permanent physical impairments and severe, permanent developmental mental retardation.

An action for damages was filed in the 24th Judicial District Court for the Parish of Jefferson naming as Defendants, Mark F. Bibeau, the parents of Mark F. Bibeau, David Schroeder, the parents of David Schroeder, their insurers, as well as Burger King Corporation, Chart House, Inc. and Diversified Foods, the owners and/or operators of the Burger King Airline Highway outlet.

Following extensive discovery by Plaintiff, summary judgment was sought by the Burger King interest. The Motion was heard in early November, 1987, taken under submission, and granted by the Trial Court on December 14, 1987.

Petitioner then timely motioned for new trial. That motion was initially heard February 2, 1988. Petitioner argued that the material facts at issue, and the fact that discovery was open, precluded summary judgment. At that time, the Trial Judge acknowledged that his original judgment was rendered in error, as he was not cognizant that discovery remained open. In lieu of reversing his decision of December 1987, the Trial Court granted Petitioner an additional sixty (60) days of discovery as the following testimony indicates:
Judge Porteous:

> "The other alternative is that I can grant your motion for new trial and set discovery aside or deny it and not set it aside. It would seem to me the more palatable solution is to allow you to finish Mr. Melling's deposition, supple-ment your motion for new trial with anything you believe that adds to the situation. <u>That is the only palatable alternative I see without having to re-file motions for summary judgment. I</u>

> do want to see what this man has to say. I agree with you. I was unaware that he was not finished.
>
> "So, basically unless there is something further you want to add, my feelings are to allow Mr. Melling's deposition and I'll keep this as an open motion for new trial, you have interrupted any period of time, and you can supplement your motion for new trial with anything you think the deposition added. It is not critical whether it will offer anything in this case that will substantially change my opinion. I need to let you finish it. That basically is the posture I'm going to keep this case in, gentlemen. I'm going to keep the motion for new trial open, allow you to complete the deposition within 60 days from today's date. That certainly should be enough time to complete it. If you complete it before that time supplement your motion. I will give you another hearing date within ten days to file and we will take it up at that point in time to conclusion. That's all I can do. I don't want to set it aside. I don't want to arbitrarily deny it without Mr. Melling's input. He may have something there that will substantially change my opinion. Trial Court Transcript of Feb. 2, 1988 Hearing.

Following this discovery period, Petitioner demonstrated that additional material facts had been disclosed by the Court-ordered discovery, and that those facts, as well as all known facts of November, 1987, were at issue. As a result of these disclosures, the Trial Judge on May 4, 1988 ordered his December, 1987 judgment set aside. "Appendix A".

Burger King et al. then applied to Louisiana 5th Circuit Court of Appeals for supervisory writs, which were granted without the benefit of the February 2, 1988 hearing transcript and the entire record. "Appendix B". That Court summarily reversed the Trial Court, thus reinstating the December, 1987, judgment dismissing the Respondents from these proceedings. In its granting of the supervisory writs, the 5th Circuit erroneously suggested that the Trial Court's Order granting Petitioner a new trial was predicated on the basis of the Court's concern to protect a client from the inaction of her attorney. "Appendix B".

Any references to inaction on the part of petitioner's attorney were unfounded and had no basis in reason or fact. Discovery in these proceedings effectively began October, 1985, after issue was joined and all defendants served. Since that time, extensive discovery had taken place. More particularly, by December 12, 1987, several series of interrogatories and requests for production of documents had been served and answered. Approximately twenty depositions had been taken, including the depositions of Mark Bibeau, David Schroeder and all known employees of the Burger King outlet who were on duty on the day of the incident, with the exception of Karl Milling. Karl Milling's deposition was attempted to be taken in October of 1986 but had to be reset because of time restraints. Milling's deposition was continued seven times, only twice because of trial commitments on petitioner's attorney's part. Therefore, any indication that the Trial Court's decision was based on an intention to protect the petitioner from the inactions of her attorney are groundless.

However, on rehearing, and with the benefit of the complete record, the 5th Circuit Court of Appeals found that it had erred in initially mischaracterizing the Trial Court's motivation for granting a new trial and after the September 8, 1988 rehearing recognized its error and set aside it's June 30, 1988 judgment. The 5th Circuit noted that it was also not the intention of the Trial Court to make such an

accusation. The Trial Court's ruling was prompted by its concern that material facts existed which precluded summary judgment.

Thus, in reversing itself and affirming the Trial Court's grant of a new trial "Appendix C", the Louisiana 5th Circuit Court of Appeals correctly concluded that there was absolutely nothing in the record before it that suggested granting summary judgment was appropriate.

After summary judgment was denied by the Appellate Court, Respondents applied to the Supreme Court of Louisiana for supervisory and/or remedial Writs of Certiorari in the captioned matter. On November 28, 1988, the Supreme Court of Louisiana granted Respondents' Application for Writs and reversed all inferior courts granting the Respondents Motion for Summary Judgment. "Appendix D". This action was taken by the Court despite the fact that three Appellate Court judges and one trial judge reviewed the entire record and determined that Summary Judgment was not appropriate.

Petitioner responded with an Application for Rehearing which sought oral arguments. Petitioner sought to orally argue that the due process protections of the 14th Amendment would bar a summary reversal at the State Supreme Court level, as this argument had just ripened; however, the Application for Rehearing was denied on January 13, 1989. "Appendix E".

Petitioner respectfully petitions this Honorable Court to grant our petition for Writs of Certiorari in order that her 14th Amendment due process protections are upheld.

REASONS FOR GRANTING THE WRIT

The Supreme Court of the State of Louisiana granted a summary reversal and dismissal of Respondent from this case. It apparently concluded that there was no genuine

issue of material fact, which is the standard for granting summary judgment in Louisiana, despite the fact that a three judge appellate panel and a trial judge had earlier denied summary judgment.

The disregard for the rights of Petitioner is highlighted by the fact that the Supreme Court of Louisiana apparently failed to follow its own standards for summary judgment in a tort case. In a tort case in Louisiana, any doubt about the resolution of a summary judgment must be resolved against the mover. *Duval v. Lake Kenilworth, Inc.*, 396 So.2d 1268 (La. 1981); *Sanders v. Hercules Sheet Metal, Inc.*, 385 So.2d 772 (La. 1980). Therefore, the Supreme Court of Louisiana should only have granted the summary reversal and dismissal if they felt without doubt that there were no issues of material fact even though all inferior courts determined that there were issues of material fact.

There is no appeal from the Louisiana Supreme Court's decision or any way to challenge that decision. The Court did not grant reasons for their summary reversal. This Court has previously held that the right of access to the court is protected by 14th Amendment due process requirements. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

It is respectfully submitted that the case sub judice would be a proper vehicle for clarifying this Court's opinion regarding the limitations that states can place upon one's right of access to the courts without overstepping the dictates of procedural due process requirements of the 14th Amendment.

PROCEDURAL DUE PROCESS REQUIRES THAT STATES PROVIDE A SYSTEM FOR CHALLENGING ALL DECISIONS DIVESTING THE RIGHT OF ACCESS TO THE COURTS

In this case, the Supreme Court for the State of Louisiana has divested petitioner of her right of access to the courts in a manner which violates her due process rights as set forth in the 14th Amendment to the United States Constitution.

PRIOR OPINIONS OF THIS COURT HOLD THAT THE RIGHT OF ACCESS TO THE COURTS IS AFFORDED DUE PROCESS PROTECTION

This Court has previously determined that the right of access to the courts is to be afforded due process protection. *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971); *Armstrong v. Manzo*, 380 U.S. 545, 522, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). In *Boddie*, this Court recognized that in situations in which the state has a "monopoly" on the manner in which a dispute can be resolved, namely through the courts; due process protections apply to the right of access to the courts.

In the present case, petitioner has no other means to seek redress for the devastating harm done to her child. Petitioner's sole means of resolution of this matter lies with the state's court system and if she is denied access to this system, she will have no alternative nonjudicial means of resolution available.

Petitioner does not argue that every defendant in a civil case has a right to an actual hearing on the merits; but rather, due process does require that in the absence of a sufficient countervailing state interest, persons forced to settle their claims of right through the judicial process must be given an opportunity to be heard at a meaningful time

and place. *Boddie, supra*; *Armstrong, supra*. Therefore, petitioner's right of access to the courts is afforded due process protection by the 14th Amendment.

THE RIGHT OF ACCESS TO THE COURTS ALSO PASSES THE BALANCE TEST OF *MATHEWS V. ELDRIDGE*

Due process is not a technical conception with a fixed content unrelated to time, place or circumstances; but rather, it is flexible and calls for such special procedural protections as each particular situation calls for. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). To determine the dictates of due process, three distinct factors must be considered: the private interest affected by the state action; the risk of erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and government's interest, including the burdens that any additional or substitute procedural requirement would entail. 424 U.S. at 335, 96 S.Ct. at 903.

In the present case, the interest affected by the state action is the right of access to the courts. Summary judgment in Louisiana is not used as a substitute for trial on the merits and cannot be used when there is any genuine issue of material fact which must be resolved. *Oller v. Sharp Elec., Inc.*, 451 So.2d 1235 (4th Cir. 1984), writ denied, 457 So.2d 1194 (La. 1984). The granting of a summary judgment in the present case denies access to the courts to an injured party who will have no alternative forum in which to seek redress for serious injuries. This liberty interest is great enough to deserve protection.

In the present system in Louisiana, the risk of erroneous deprivation of many rights beside the right of access to the courts may take place. A number of interests other than the right of access to the courts may be affected by allowing parties to be denied access to the courts which

may be the only forum for enforcing their alternative interest. For example, a person whose civil rights have been violated must seek redress through the courts, and if his access to the courts is denied, erroneously, he is denied two rights at once. Therefore, the danger and risk of erroneous deprivation is great.

The Louisiana legislature saw the dangers involved in allowing courts to grant summary judgments; therefore, they specifically disallowed appeals which seek to have appellate courts grant summary reversals when a trial Court refused to grant summary judgment, see LSA-C.C.P. Art. 968. This indicates that the legislature felt that it is important to have only the trial Courts decide on motions for summary judgment in order for there to be an appeal of right on the granting of all summary judgments. By granting writs and summary reversals, the Supreme Court of the State of Louisiana creates exceptions to the protections afforded by the legislature, see dissenting opinion of Justice Cole in *Haas v. Gill*, 531 So.2d 457, 459 (La. 1988), rehearing denied, 532 So.2d 170 (La. 1988). The dangers of erroneous deprivation of the right of access to the courts of Louisiana are greater now than the risk that the legislature was willing to allow.

There is concern in the Supreme Court of Louisiana itself for the right of access to the courts which is denied without due process when that Court grants a summary reversal and dismissal. As Justice Cole stated in *Haas* at 460:

> "In a summary reversal, there is no indication the right of the plaintiff to his 'day in court' was considered . . . Without the judicial arena, there is no place for plaintiffs to seek equal protection against their powerful and influential adversary. They are relegated to the role of victims."

Justice Cole apparently departed from his concerns, voiced only two months prior to the consideration of the case sub judice, and voted to grant summary judgment.

The purpose of summary judgment in Louisiana is to enable courts to expedite the disposition of cases. *Howard v. General Motors Acceptance Corp.*, 324 So.2d 834 (2nd Cir. 1975). The granting of writs and summary reversals by the Supreme Court of the State of Louisiana may save some small amounts of money for the state; however, the state legislature felt that such savings were not worth the danger of erroneous summary reversals taking place as evidenced by their wording of LSA-C.C.P. Art. 968 which states in part:

> "[A]n appeal does not lie from the court's refusal to render any judgment on the pleadings or summary judgment."

When the balance is struck between the three factors set forth in *Mathews*, it becomes evident that some degree of protection should be afforded to the rights of the citizens of Louisiana of access to the courts. The cost of such protections are minimal while the damage caused by erroneous grants of summary judgments are devastating.

REMEDIES TO PROVIDE PROTECTION OF THE RIGHT OF ACCESS TO THE COURTS

The remedies that should be prescribed by this Court in order to cure the defects in Louisiana's system of summary reversals is twofold: all grants of summary judgment should be subject to a meaningful challenge and opinions granting summary judgment should contain reasons.

In *Rainbow Val. Citrus Corp. v. Federal Crop Ins. Corp.*, 506 F.2d 467, 469 (9th Cir. 1974), the Ninth Circuit held that procedural due process requires that when a liberty or property interest is invaded by the government, an opportunity to challenge the proported justification of the

invasion must be guaranteed. The Louisiana legislature attempted to guarantee the availability of an appeal in instances where a party's right of access to the courts was invaded through summary judgment by its explicit prohibition on appeals of denials of motions for summary judgment. When the Supreme Court of Louisiana grants writs and a summary reversal, there is no challenge available to any other authority. The ability to move for a rehearing cannot be said to be a meaningful challenge because the same body that ruled on the summary judgment would hear the challenge. Therefore, the Supreme Court of Louisiana should not be allowed to grant writs and summary reversals when all inferior courts have denied the motion for summary judgment.

In *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970), this Court held that procedural due process requires that when a liberty or property interest is invaded by the government, reasons for the invasion should be provided to the party who is being denied his interest before the final determination is made so that he can respond. When a peremptory ruling is handed down by the Supreme Court of Louisiana, procedural due process requires that, at a minimum, the grounds used to determine the matter should be divulged. In the present situation, written reasons should be required from the Supreme Court of Louisiana which originally granted the Motion for Summary Judgment in order for the Petitioner, who is being denied access to the courts, to be informed enough to prepare a meaningful response.

CONCLUSION

The right of access to the courts is an interest which is protected by the 14th Amendment's procedural due process requirements. In the present situation, those procedural due process requirements have not been met. Therefore, this Court should grant the Petition for Writ of Certiorari and limit the use of summary judgments to courts from which appeals can be taken and to require that courts granting summary judgments provide reasons for their decisions.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

MARGARET J. ALLARD, AS NATURAL TUTRIX OF THE MINOR, JAMES ALLARD AND CYRILLA ALLARD — NUMBER 309-422

VERSUS

MARK F. BIBEAU, MR. AND MRS. ROBERT E. BIBEAU — DIVISION "A"

Proceedings taken in the above-numbered and entitled cause, in open Court, Division "A", on Tuesday, February 2, 1988, before the Honorable G. Thomas Porteous, Jr., Judge Presiding.

APPEARANCES:

FOR THE PLAINTIFF:
FRANK DUDENHEFER, Attorney at Law

FOR THE DEFENDANT:
ROBERT ANGELLE, Attorney at Law

REPORTED BY: LISA BROUSSARD, CSR
OFFICIAL COURT REPORTER

Transcript, pages 33 through 35:

"I'm going to grant the motion for new trial in this case because if this Court does not have an abiding confidence in its own judgment I cannot ask a reviewing Court to have an abiding confidence in my ruling. Gentlemen, I'm telling you right now, when you leave here today I am establishing cutoff dates. I am establishing deposition dates. We are going to finish this case. This case has been on this docket since 1985. We are going to get this case over with. We are going to find out everything that we can find. You are not coming back and telling me you need more discovery.

The motion for new trial is granted.

Prepare a judgment.

MR. DUDENHEFER:

Thank you, Your Honor."

CERTIFICATE

I, Lisa Broussard, CSR, Official Court Reporter, do hereby certify that the foregoing transcript is true and correct as taken by me in open Court at Gretna, Louisiana, before the Honorable G. Thomas Porteous, Jr., on Wednesday, May 4, 1988, in the matter entitled MARGARET J. ALLARD, ET AL VERSUS MARK F. BIBEAU, JR., ET AL, NUMBER 309-422

LISA BROUSSARD, CSR
Official Court Reporter
Twenty-Fourth Judicial District
In and For the Parish of Jefferson
State of Louisiana

APPENDIX B

APPLICATION FOR WRIT

NO. 88-C-387

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

JUNE 17, 1988

/s/ illegible
Clerk

MARGARET ALLARD, AS NATURAL TUTRIX OF THE MINORS, JAMES ALLARD AND CYRILLA ALLARD

VERSUS

MARK F. BIBEAU, MR. & MRS. ROBERT E. BIBEAU, MR. & MRS. DAVID SCHROEDER, INDIVIDUALLY, AND AS PARENTS AND/OR GUARDIANS OF DAVID SCHROEDER, DIVERSIFOODS, INC., BURGER KING CORPORATION, CHART HOUSE, INC. AND ALLSTATE INSURANCE COMPANY

In Re BURGER KING CORPORATION, CHART HOUSE, INC., AND DIVERSIFOODS, INC.

Applying for WRIT OF REVIEW OF CERTIORARI, DIRECTED TO THE HONORABLE G. THOMAS PORTEOUS, JUDGE - 24TH J.D.C., PARISH OF JEFFERSON, STATE OF LOUISIANA, DIVISION "A", NUMBER 309-422

Robert Angelle
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One Galleria Blvd.
Suite 912
Metairie, Louisiana 70001
(504) 836-5990

WRIT GRANTED
Gretna, Louisiana
this 30th day of
June 1988.

(SEE ATTACHED)

Attorneys for Relator

(Respondent Attorney's
on next page)

Attorneys for Respondent

APPENDIX C

MARGARET ALLARD, AS NATURAL TUTRIX OF THE MINORS, JAMES ALLARD and CYRILLA ALLARD * NO. 88-C-387

* COURT OF APPEAL

VERSUS * FIFTH CIRCUIT

MARK BIBEAU, ET AL * STATE OF LOUISIANA

IN RE BURGER KING CORPORATION, CHART HOUSE, INC., AND DIVERSIFOODS, INC. APPLYING FOR WRIT OF REVIEW OF CERTIORARI, DIRECTED TO THE HON. G. THOMAS PORTEOUS, JUDGE, 24TH JDC, PARISH OF JEFFERSON, STATE OF LOUISIANA, NO. 309-422, DIVISION "A"

WRIT GRANTED

Since respondents did not attempt to show that the evidence offered at the hearing on its motion for new trial could not have been obtained with due diligence before the hearing on relators' motion for summary judgment, respondent was not entitled to a grant of its motion for new trial on peremptory grounds. See La. C.C.P. art. 1972. However, La. C.C.P. art. 1973 states, "A new trial may be granted in any case if there is good ground therefor, except as otherwise provided by law." (emphasis added.)

After granting relators' motion for summary judgment, the trial judge has some misgivings because respondent claims it was unable to finish deposing one of relators' employees prior to the hearing on the motion for summary judgment. The court gave respondents additional

time for discovery after relators' motion for summary judgment had been granted. As respondent had over 3-1/2 years to conduct discovery before the hearing on the motion for summary judgment, and 3 months after the motion was filed to do so, respondent was obviously given more than a "fair opportunity to present" its claim. See *Borne v. Miller*, 505 So.2d 160, 162 (La. App. 4th Cir. 1987); *R & R Enterprises of New Orleans, Inc. v. River and Gulf Marine Surveyors, Inc.*, 476 So.2d 12, 15-16 (La. App. 5th Cir. 1985).

The trial court's well-intentioned grant of respondent's motion for new trial under the circumstances of this case was an abuse of discretion, albeit intended to protect a client from the inaction of her attorney. The trial court's grant of respondent's motion for new trial is hereby set aside.

Gretna, Louisiana, this 30th day of June 1988.

/s/ JUDGE CHARLES GRISBAUM, JR.

/s/ JUDGE LAWRENCE A. CHEHARDY

/s/ JUDGE H. CHARLES GAUDIN

A TRUE COPY

GRETNA JUNE 30, 1988

/s/ illegible CLERK
COURT OF APPEAL, FIFTH CIRCUIT

APPENDIX D

MARGARET ALLARD, AS NATURAL TUTRIX OF THE MINORS, JAMES ALLARD AND CYRILLA ALLARD	*	NO. 88-C-387 COURT OF APPEAL FIFTH CIRCUIT
VERSUS	*	STATE OF LOUISIANA
MARK F. BIBEAU, MR. AND MRS. ROBERT E. BIBEAU, MR. & MRS. DAVID SCHROEDER, INDIVIDUALLY AND AS PARENTS AND/OR GUARDIANS OF DAVID SCHROEDER, DIVERSIFIED FOODS, INC., BURGER KING CORPORATION, CHART HOUSE, INC., AND ALLSTATE	*	

ON APPLICATION FOR REHEARING

The application for rehearing is granted. Based upon the application, the attached briefs, and the record before us, along with the brief of the opposition, we hereby set aside our June 30, 1988 grant of the writ and remand the matter to the trial court for further proceedings.

In light of our review of the record and briefs, we find that the plaintiff's right to a new trial outweighs the concerns raised by the delay in discovery. Ergo, we reverse our prior grant of the writ.

Gretna, Louisiana, this 8th day of September, 1988.

/s/ Judge Charles Grisbaum, Jr.
JUDGE CHARLES GRISBAUM, JR.

/s/ Judge Lawrence A. Chehardy
JUDGE LAWRENCE A. CHEHARDY

/s/ Judge H. Charles Gaudin
JUDGE H. CHARLES GAUDIN

A TRUE COPY

Gretna September 8, 1988

/s/ illegible CLERK
COURT OF APPEAL, FIFTH CIRCUIT

APPENDIX E

IN SUPREME COURT OF THE

STATE OF LOUISIANA

MARGARET ALLARD, AS
NATURAL TUTRIX OF THE
MINORS, JAMES ALLARD
AND CYRILLA ALLARD

VS. NO. 88-CC-2477

MARK F. BIBEAU
et al

— — — — — —

IN RE: Burger King Corp.; Chart House Inc.; Diversifoods Inc.; - Other(s); Applying for Supervisory and/or Remedial Writs; to the Court of Appeal, Fifth Circuit, Number 88-CW-0387; Parish of Jefferson 24th Judicial District Court Div. "A" Number 309-422.

— — — — — —

November 28, 1988

Granted. Motion for Summary Judgment filed by applicants-defendants granted and action dismissed as to said defendants.

LFC
JAD
WFM
JCW

Supreme Court of Louisiana
November 28, 1988

/s/ illegible
Deputy Clerk of Court
For the Court

APPENDIX F

THE SUPREME COURT OF THE

STATE OF LOUISIANA

MARGARET ALLARD, ET AL

VS. NUMBER 88-CC-2477

MARK F. BIBEAU, ET AL

— — — — — —

IN RE:ALLARD, MARGARET ET AL, applying for Rehearing of Writ Granted With Order on November 28, 1988; to the Fifth Circuit Court of Appeal, Number 88-CW-0387; to the 24th Judicial District Court, Number 309-422, Parish of Jefferson, Division A.

— — — — — —

January 13, 1989
Denied.

WFM
JCW
HTL
LFC

CALOGERO & DENNIS, JJ., would grant the rehearing.

Supreme Court of Louisiana
January 13, 1989

/s/ illegible
Clerk of Court
For the Court

APPENDIX G

SUPREME COURT

STATE OF LOUISIANA

NO. 88 CC 2477

MARGARET ALLARD, AS NATURAL TUTRIX OF THE MINORS, JAMES ALLARD AND CYRILLA ALLARD

v.

MARK F. BIBEAU, MR. & MRS. ROBERT E. BIBEAU, MR. & MRS. DAVID SCHROEDER, INDIVIDUALLY, AND AS PARENTS AND/OR GUARDIANS OF DAVID SCHROEDER, DIVERSIFOODS, INC., BURGER KING CORPORATION, CHART HOUSE, INC. AND ALLSTATE INSURANCE COMPANY

PETITION TO THE SUPREME COURT OF LOUISIANA FOR WRIT OF REVIEW OF CERTIORARI OF THE JUDGMENT OF THE COURT OF APPEAL, FIFTH CIRCUIT, STATE OF LOUISIANA

VOLUME I

APPLICATION BY MARGARET ALLARD, AS NATURAL TUTRIX OF THE MINORS, JAMES ALLARD AND CYRILLA ALLARD, FOR REHEARING OF NOVEMBER 28, 1988 RULING GRANTING WRITS AND FURTHER GRANTING OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS/APPLICANTS BURGER KING CORPORATION, CHART HOUSE, INC. AND DIVERSIFOODS, INC.

Respectfully submitted.

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Cyrilla Allard

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SPECIFICATIONS OF ERROR

1. This Court was in error in reversing decisions of lower Courts denying Summary Judgment without a demonstration of palpable error on the part of those Courts.

2. This Court was in error in granting Summary Judgment in a case in which genuine issues of material fact exist and are substantiated by properly submitted evidence, thus reversing Louisiana law and jurisprudence.

3. This Court was in error in granting Summary Judgment in the face of incomplete discovery.

4. This Court was in error in granting Summary Judgment in this most serious tort action, in which genuine issues of material fact exist, without extensive briefing, oral argument, or written reasons for judgment for the assistance of counsel.

SUPREME COURT

STATE OF LOUISIANA

NO. 88 CC 2477

MARGARET ALLARD, AS NATURAL TUTRIX OF THE MINORS, JAMES ALLARD AND CYRILLA ALLARD

v.

MARK F. BIBEAU, MR. & MRS. ROBERT E. BIBEAU, MR. & MRS. DAVID SCHROEDER, INDIVIDUALLY, AND AS PARENTS AND/OR GUARDIANS OF DAVID SCHROEDER, DIVERSIFOODS, INC., BURGER KING CORPORATION, CHART HOUSE, INC. AND ALLSTATE INSURANCE COMPANY

MAY IT PLEASE THE COURT:

Plaintiff, Margaret Allard, in her representative capacity as natural tutrix of her minor children, James Allard and Cyrilla Allard, submits that the action of this Court in granting the writ application of Burger King Corporation, Chart House, Inc. and Diversified Foods, Inc. and reversing instanter the rulings of the Trial Court and Appellate Court, was error and contrary to the law of the State of Louisiana, and has greatly aggrieved Plaintiff. Accordingly, Plaintiff

further submits that she is entitled to a rehearing, for the reasons discussed below.

I. PREAMBLE

Plaintiff respectfully submits that this Court's ruling of November 28, 1988 (Exhibit 1b), granting the original Motion for Summary Judgment filed at the trial level by defendants/applicants, is in error.

The grant of summary judgment reverses Louisiana law and jurisprudence on this issue. Clearly, a grant of summary judgment contradicts both the letter of La. C.C.P. Art. 966 and the legislative intent behind that article when, as in the instant case, genuine issues of material fact exist. The Court's November 28 ruling also reverses the line of jurisprudence constant by this very Court and by Courts below. The Supreme Court of the State of Louisiana and the Appellate Courts have consistently held that grants of summary judgment are not appropriate when there are genuine issues of material fact in controversy. It was also error to grant Summary Judgment in the face of incomplete discovery, reversing *Lashouto v. Norwood*, 516 So.2d 125 (La. 1987) where a uniminous Court, in the face of incomplete discovery, reversed the First Circuit and denied summary judgment. Further, Plaintiff suggests that this Court erred in handing down such a radical ruling and in so substituting its judgment for that of the Trial and Appellate Courts without requiring extensive briefing, without permitting oral argument, and without written reasons for its decision. For these reasons, Plaintiff urges that a rehearing of the matter is fully in the interest of justice and proper in the circumstances.

Finally, at rehearing, Plaintiff will show that genuine issues of material fact exist. Among other issues, Plaintiff contends that defendants/applicants had a duty to provide security for their patrons because they should have known

that those who patronized their restaurant encountered security risks. Plaintiff has properly introduced at both trial and appellate level evidence made an exhibit to the deposition of defendants' store manager that substantiates Plaintiff's claim and creates an issue upon which reasonable minds may differ. The genuine issue of fact so created is material to the case, and thus must be submitted to a finder of fact for resolution. Genuine issues of fact also existed, even before the introduction of this evidence identified through discovery. Moreover, further discovery on a corporate level is yet to be had in this complex and serious tort case.

Summary judgment is not appropriate in this case, under the law and the jurisprudence. On rehearing, the ruling of November 28, 1988 should be reversed. Defendants/Applicants' Motion for Summary Judgment should be denied.

II. OPENING STATEMENT

This case involves serious and permanently disabling injury to a four year-old child. The injury occurred in April, 1985 as the culmination of a threatening incident that began on the premises of the Airline Highway Burger King restaurant. The Plaintiff contends that incidents of such a nature as to involve a security risk to patrons of the Burger King restaurant occurred frequently, were known to management, and required the presence of security monitoring to avert or to minimize the threat to customer security.

Further, the Plaintiff contends that the conduct that resulted in injury to young James Allard fell within the ambit of the security monitoring, such that the failure to provide security monitoring was a negligent failure of the duty of Burger King to James Allard, by which negligence James

Allard sustained injury. As evidence of the security risk, Plaintiff has confronted Burger King management with records of service calls dated 1982 onward from the Burger King Airline outlet to the Jefferson Parish Sheriff's Office for handling 55 plus serious violations of Louisiana criminal statutes, including armed robbery, sex crimes and the like, not to mention numerous disturbance of the peace calls. Plaintiff submits that these calls should show knowledge on the part of Burger King defendants of a real and present security risk to Burger King patrons. Under the Code and the caselaw, the questions of the security risk and of Burger King's duty to James Allard should be decided by a finder of fact. Plaintiff offers the following factual and procedural overviews in initial substantiation of her contentions.

The Trial Court and the Appellate Court further recognized that in the face of ongoing discovery, Summary Judgment was premature.

A. STATEMENT OF FACTS

On April 14, 1985, Cyrilla Allard and her then four year-old brother James, accompanied by four of Cyrilla's friends (Shawn Martin, Natalie Turner, Vicky Roche and Melody Neff), left the Allards' home for the Burger King outlet at 3735 Airline Highway, a block and one-half away, to use the pay telephone at the rear of the Burger King outlet. They were thus Burger King's invited patrons, since Burger King receives a commission from South Central Bell on all local and long-distance calls originating from these pay telephones. The pay telephones are located immediately adjacent to the drive-up service lane and stand back-to-back, next to the speaker system used by Burger King to receive drive-up orders. Directly across from the telephones are additional parking spaces provided for Burger King customers. Within several feet of these telephones is the store's rear entrance.

Cyrilla Allard called her aunt and Natalie Turner called her parents. Customers were entering and exiting the restaurant using the rear door (Exhibit 1, p. 29). While these calls were being placed, Melody Neff took James Allard into the restaurant, through the rear entryway, and used the restroom facilities. While inside, Melody Neff's attention was drawn to defendants Mark Bibeau and David Schroeder (these Defendants wore shorts; Mark Bibeau was bare-chested [Exhibit 2, p. 40]).

Cyrilla Allard and David Schroeder were the same age and had attended the same junior high school. David Schroeder had the reputation of one who associated with the wrong crowd, drank and used drugs (Exhibit 3, p. 43). Mark Bibeau was much older than the girls, approximately age 20, and consequently they did not know him (Exhibit 3, p. 37). Both Mark Bibeau and David Schroeder appeared drunk (Exhibit 4, p. 45; Exhibit 3, p. 26).

Melody and James then walked outside, to the rear of the Burger King store, and joined the group. Vicky Roche was standing near the phone, waiting for Cyrilla to finish her call, when she noticed David Schroeder exiting from the rear of the Burger King, along with Mark Bibeau. A dog approached defendants Bibeau and Schroeder as they left the building, and Mark Bibeau kicked the dog; the dog's owner then stood nearby to watch the ensuing events (Exhibit 2, p. 46). One of the girls acknowledged David Schroeder's presence; he did not respond. Another girl commented that the Defendants looked as if they were "drunk" or "loaded" (Exhibit 1, p. 35). Mark Bibeau did not initially respond, but stood in the parking lot staring at the girls (Exhibit 2, p. 44). The Defendants then starting yelling verbal insults such as "Fuck you," "I'm gonna fuck you bad," and "Bunch of bitches" (Exhibit 2, pp. 20, 32 and 45). The resulting noise level, the vulgarity, and the threats of physical violence were of such a level as to attract the attention of neighbors (Exhibit 2, p. 46).

violence were of such a level as to attract the attention of neighbors (Exhibit 2, p. 46).

Cyrilla demanded that Mark Bibeau and David Schroeder stop cursing in front of her young brother. Nevertheless, the Defendants continued to yell obscenities and derogatory comments for a period of ten to twenty minutes (Exhibit 2, p. 48). Being concerned, the girls, along with James, hurriedly left the parking lot area, walking in the direction of Division Street. At the same time Mark Bibeau and David Schroeder entered their truck and began racing the engine loudly (Exhibit 2, p. 51). Melody and James walked ahead of the group down Division Street. The Defendants left the parking lot, Mark Bibeau driving, and followed the girls as they exited the lot and traveled down Division Street (Exhibit 5, p. 41). In an attempt to taunt and frighten the girls, Bibeau and Schroeder continued to shout similar obscenities, racing the truck forward and then stopping (Exhibit 5, p. 47). Melody yelled for the girls to start running. She started running with James whose hand she was holding. James broke away, afraid, and ran ahead of Melody (Exhibit 2, pp. 26 - 27). Both were running for cover. Defendants Bibeau and Schroeder sped forward in the truck and struck James with the vehicle, knocking him to the ground. The Defendants then backed the truck up and ran over James a second time, thereafter fleeing the scene (Exhibit 1, pp. 54 - 55). As a result of the foregoing, James Allard is profoundly retarded, both physically and mentally. He will never overcome the tragic consequences of the incident that originated on premises under the custody and control of the Burger King defendants.

B. STATEMENT OF THE CASE

An action for damages was filed in the 24th Judicial District Court for the Parish of Jefferson naming as Defendants Mark F. Bibeau, the parents of Mark F. Bibeau, David Schroeder, the parents of David Schroeder, their

insurers, as well as Burger King Corporation, Chart House, Inc., and Diversified Foods, the owners and/or operators of the Burger King Airline Highway outlet (Exhibit 6).

Following extensive discovery by Plaintiff, discussed infra, summary judgment was sought by the Burger King interests. The Motion was heard in early November, 1987, taken under submission, and granted by the Trial Court on December 14, 1987.

Plaintiff then timely applied for a new trial (Exhibits 11, 12, 13) which was initially heard February 2, 1988. Plaintiff argued that the material facts at issue, and the fact that discovery was open, precluded summary judgment. At that time, the Trial Judge acknowledged that his original judgment was rendered in error, as he was not cognizant that discovery remained open, although this fact had been made clear in the Plaintiff's pleadings filed in opposition to the Motion for Summary Judgment. In lieu of reversing his decision of December 1987, the Trial Court granted Plaintiff an additional sixty days of discovery.

At the time of the Motion for New Trial in February, the Trial Court clearly stated that it was previously unaware of the incomplete discovery. The significance of this admission cannot be overstated, for Plaintiff had urged in her opposition and supplemental opposition to the original Motion for Summary Judgment filed respectively October 6, 1987 and November 17, 1987, that discovery was incomplete. In February, the Court ordered that further discovery should be had; defendants made no objection to such discovery.

Following this discovery period, Plaintiff demonstrated that additional material facts had been disclosed by the Court-ordered discovery, and that those facts, as well as all facts known from the considerable discovery that had previously occurred as of November, 1987, were at issue. Thus summary judgment was inappropriate. Plaintiff further

showed that the Burger King defendants had not legally responded to discovery occurring during this Court-ordered discovery phase, between February and May, 1988, and that additional discovery was needed.

On May 4, 1988 the Trial Judge ordered his December, 1987 judgment set aside. Burger King et al. then applied to the Court of Appeals for the Fifth Circuit for supervisory writs, which were granted instanter, without the benefit of the February 2, 1988 transcript and the entire record. Initially, the Fifth Circuit Court of Appeal summarily reversed the Trial Court, thus reinstating the December, 1987, judgment and dismissing the Burger King Defendants from these proceedings.

However, on rehearing, with the benefit of the complete record, the Appellate Court reversed its previous decision, finding that summary judgment was not appropriate considering all the circumstances of the case. Defendant Burger King's application for writs to this Court resulted in a reversal of the final judgments of both the trial and the appellate court, without extensive briefing, oral argument, or written reasons. The Plaintiff is seriously aggrieved by this decision, and requests a rehearing of the matter, in the interest of justice.

III. ARGUMENT

Without written reasons for judgment, Plaintiff can only discuss the law relating to Summary Judgment and the propriety of the reasoning of the courts below in their final decisions that summary judgment was not appropriate. Plaintiff hereby requests leave, therefore, to address in supplemental briefing any matters upon which this Court may indicate it requires further information.

A. A GRANT OF SUMMARY JUDGMENT IN THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT IS CONTRARY TO THE LAW AND TO THE JURISPRUDENCE.

On November 8, 1988, this Court reversed the decisions of four judges, one at the trial and three at the appellate level, who upon review of the entire record in this case determined that Summary Judgment was not appropriate because genuine issues of material fact existed on which reasonable minds could differ.

Further, this Court reversed the lower courts without extensive briefing, oral arguments, or written reasons given as assistance to the law. Plaintiff respectfully suggests that this Court has deviated from the standard it set for itself in *Herlitz Construction Co., Inc. v. Hotel Investors of New Iberia, Inc.*, 396 So.2d 878 (La. 1981), in which it stated that it "will not exercise its supervisory jurisdiction [in summary judgment practice] save in cases where there is palpable error in the ruling. . ." Yet the rulings of the Courts below were in accordance with the law and the jurisprudence. Plaintiff suggests that without any demonstration of "palpable error," this Court's November 28, 1988 ruling was an abuse of its own discretionary standard.

La. C.C.P. Art. 966 reads in pertinent part as follows:

> ". . . The judgment sought shall be rendered forthwith if the pleadings, **depositions**, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law (emphasis supplied)."

In the instant case, attached to the deposition of Mr. Karl Melling, the Burger King Airline store manager, completed March 17, 1988 (within the Court ordered discovery phase from February to May, 1988), were the reports of service calls dated 1982 onward to the Jefferson Parish Sheriff's Office from the Burger King Airline outlet. Mr. Melling was questioned about these calls. The calls, his responses regarding them and the whole of his deposition testimony, create the genuine issue of material fact--whether or not a security risk to patrons existed at the Airline Highway Burger King outlet--that defendant Burger King in its writ application so assiduously and dis- ingenuously sought to characterize as "new" evidence. Far from being "new" evidence that the trial court should not have considered, however, the service calls were used as impeachment documents at the March, 1988 deposition of Mr. Melling, a deposition taken well before the Trial Court's May, 1988 decision. The trial court had made it clear in February that summary judgment would not be "arbitrarily [granted] without Mr. Melling's input [because he] may have something there that will substantially change my opinion." (Transcript, February 1988 hearing) (Exhibit 15). The documentation of the service calls was introduced at Mr. Melling's deposition in March and known at that time to counsel for defendants. Moreover, the deposition and its exhibits were properly submitted for consideration by the Court in pleadings considered at the May, 1988 hearing (Exhibit 13 and 28). The Burger King defendants' attempt to characterize documents used at and attached to a deposition in March as "new" evidence in May seems, to say the least, disingenuous. The courts below properly considered that evidence and properly identified a genuine issue of material fact such that summary judgment was inappropriate, and properly reversed their previous grants.

For the caselaw is clear that summary judgment should be granted sparingly and only in the most stringent circumstances:

> ". . . **Only** when it is shown that **no genuine issue of material fact exists** and that movant is entitled to a judgment as a matter of law, but moving party for Summary Judgment has the burden of showing absence of genuine issue as to any material fact, **and where the trial Court is presented with a choice of reasonable inferences** to be drawn from subsidiary facts contained in affidavits, attached exhibits and **depositions, reasonable inferences must be viewed in light most favorable to the party opposing** the Motion." Duval v. Lake Kenilworth Inc., 396 So.2d 1268 (La. 1981). (emphasis supplied).

In the Duval case, this Court but reaffirmed a standard clearly enunciated previously in the jurisprudence. A good summary of jurisprudence with respect to summary judgment proceedings is contained in *Swindle v. Haughton Wood Co., Inc.*, 458 So.2d 992 (La. App. 2nd Cir. 1984). That court said:

> "The jurisprudence of this state has been consistent in its interpretation of this article. A motion for summary judgment should be granted if, and only if, the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. Bartlett v. Calhoun, 430 So.2d 1358 (La. App. 3d Cir. 1983); Jones v. Prudential Ins. Co. of America, 415 So.2d 223 (La. App. 2d Cir. 1982); Jewell v. Thompson, 386 So.2d 689 (La. App. 3d Cir. 1980), writ denied 393 So.2d 746, and others. The burden of proof in a motion for summary judgment is on the mover

to establish that there are no genuine issues of material fact. This burden is a great one. Only when reasonable minds must inevitably concur is a summary judgment warranted and any doubt should be resolved in favor of a trial on the merits. Sanders v. Hercules Sheet Metal, Inc., 385 So.2d 772 (La. 1980); Jones v. Prudential Ins. Co. of America, supra; Tipton v. Lewis, 403 So.2d 806 (La. App. 2d Cir. 1981).

In short, a summary judgment is no substitute for a trial on the merits. Hebert v. Vice, 413 So.2d 342 (La. App. 3d Cir. 1982); Millet v. Johnson, 381 So.2d 1293 (La. App. 4th Cir. 1980)."

458 So.2d at 994 and 995.

The standard of scrutiny for documents submitted is clear:

"Papers supporting the position of the party moving for summary judgment are to be **closely scrutinized**, while the opposing papers are to be **indulgently treated**. Vermillion Corp. v. Vaughn, 397 So.2d 490 (La. 1981). (Emphasis supplied).

The moving party must:

". . .establish that there are no genuine issues of material fact. This burden is a great one. **Only when reasonable minds must inevitably** concur is a summary judgment warranted and **any doubt should be resolved in favor of a trial on the merits**. Sanders v. Hercules Sheet Metal, Inc., 385 So.2d 772 (La. 1980); Jones v. Prudential Ins., Co., of America,

> supra; Tipton v. Lewis, 403 So.2d 806 (La. App. 2d Cir. 1981)" (Emphasis supplied).

See also *Oller v. Sharp Elec., Inc.*, 451 So.2d 1235 (La. App. 4th Cir. 1984):

> "A summary judgment is not to be used as a substitute for a trial on the merits. **The court should not seek to determine whether it is likely the mover will prevail on the merits**, but rather whether there is an issue of material fact. Frye v. Texas Brine Corp., 425 So.2d 310 (3rd Cir. La. 1982). (Emphasis supplied).

The Court granting a Motion for Summary Judgment must satisfy itself that it has no doubts whatsoever about the propriety of its actions. In *Jewel v. Thompson*, 386 So.2d 689 (La. App. 3rd Cir. 1980), writ denied 393 So.2d 746, the Court said:

> "Affidavits and other documents are not substitutes for findings of fact by a court. This type of evidence must be scrutinized carefully when passing on the question of the granting of summary judgment . . . Summary Judgments are not favored and **any doubt will be resolved against the granting thereof**, even where it may be favored by a preponderance of the evidence. Walker v. Graham, 343 So.2d 1171 (La. App. 3d Cir. 1977), writ denied, 346 So.2d 213 (La. 1977)." 386 So.2d at 692. (Emphasis supplied)

And other courts agree that any doubts are to be resolved in favor of the party opposing the Motion:

> "This court, in considering a Motion for Summary Judgment **should resolve every reasonable doubt against the mover**. Burke v. Accidental Life Insurance Co. of Cal., 416 So.2d 177 (4th Cir., La. 1982). (Emphasis supplied).
>
> "**All reasonable doubts are resolved against the granting of summary judgment.**" American Bank and Trust v. Sunbelt Environmental, 451 So.2d 1111 (1st Cir., La. 1984); Walker v. Graham, 343 So.2d 1171 (3rd Cir., La. 1977). (Emphasis supplied).

In *Turberville v. Georgia Pacific Chemical Co.*, 385 So.2d 366 (La. App. 1st Cir. 1980) the court held:

> "A summary judgment is not to be used as a substitute for a trial on the merits. The court should not seek to determine whether it is likely the mover will prevail on the merits but rather whether there is an issue of material fact. **In ruling on the motion, all doubts as to the propriety of a summary judgment are to be resolved against the mover. The evidence should be liberally construed in favor of the party opposing** the motion. Odom v. Hooper, 273 So.2d 510 (La. 1973); Walker v. Graham, 343 So.2d 1171 (La. App. Cir. 1977); Green v. Southern Bell Telephone & Telegraph Company, 204 So.2d 648 (La. App. 3d Cir. 1967)." 385 So.2d at 368 (Emphasis supplied).

Further, Louisiana courts have held that summary judgments are appropriate only after adequate discovery. *Cosse v. Schwegmann Bros.*, 336 So.2d 1074 (La. App. 4th

Cir. 1980), *Continental Casualty Co. v. McClure*, 313 So.2d 260 (La. App. 4th Cir. 1975).

In the instant case, considerable discovery as discussed below, took place before December, 1987. Defendants had agreed that discovery should proceed in tiers, and they and the Court were informed in December and again in February that an extremely significant deposition in the second tier - - that of Mr. Karl Melling - - was incomplete.

In *Sam Lashouto et al. v. Norwood C. Thornton, Jr., et al.*, 516 So.2d 125 (La. 1987), this Court in an undivided opinion, all seven members agreeing, granted writs and reinstated the judgment of the Trial Court, denying Summary Judgment in the face of incomplete discovery. (Exhibit 1a). The ruling in the case at bar seems all the more inconsistent, for here, in similar circumstances, not only is a further tier of discovery (the third or corporate level) incomplete, but also in the first and second tiers, genuine issues of fact that should preclude summary judgment have been identified.

Finally, there can be no question that the results of the second tier of discovery, including the deposition of Mr. Melling with the documentation of the service calls attached as exhibits, were properly before the Trial and Appellate Courts and submitted as evidence in properly filed pleadings, particularly when the Trial Court had set no deadlines whatsoever for submission of evidence:

> "Depositions introduced the day of hearing of motion for summary judgment are admissable and should be considered by trial court. Jones v. Jones, 385 So.2d 880 (La. App. 2nd Cir. 1980).

The evidence of the service calls was properly before the Court in May, 1988 and instrumental in that Court's

decision, for it was that evidence the Trial Court cited that caused a "lack of abiding confidence" in its previous judgment and that caused it to discern issues upon which reasonable minds might differ. (Transcript, May 1988 hearing).

In *Casnave v. Dixie Building Material Company, Inc.*, 490 So.2d 381 (La. App. 4th Cir. 1986), the appellate court cited this Court in *Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., et al.*, 396 So.2d 878 (La. 1981) as authority for the proposition that higher courts "generally . . . will not exercise supervisory jurisdiction to review the denial of a Motion for Summary Judgment" unless "there is no dispute of fact." Clearly, under its own jurisprudence, this court has exceeded its supervisory authority, for there are in the instant case genuine and material disputes of fact that should be subject to resolution only by a trier of fact.

B. GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, IDENTIFIED THROUGH DISCOVERY, PRECLUDE SUMMARY JUDGMENT.

The law is clear that summary judgment should not be granted when there are genuine issues of material fact in dispute that, as in the instant case, are identified through discovery. The Law is also clear that Summary Judgment is not appropriate where discovery is not complete.

1. Discovery was incomplete for reasons not chargeable to the Plaintiff.

Defendants throughout their writ application rely on gratuitous and inapposite commentary regarding delays in discovery to suggest that Summary Judgment is proper in this case. Their reasoning is ill founded, for no decision of the Trial Court or of the Appellate Court was based on any real,

let alone any perceived, delay in discovery that could be chargeable to the Plaintiff.

Depositions were not complete as of December, 1987, for reasons not chargeable to Plaintiff. All counsel agreed on the order of depositions. The principals would be deposed first, then scene witnesses (local Burger King employees) in the second tier of discovery; only thereafter would discovery proceed to the third, or corporate level. In November, 1987, it was made clear to the Trial Court that while extensive discovery had taken place, the significant deposition of Mr. Karl Melling had not been completed. Following an entire day of depositions in October, 1986, Plaintiff began the deposition of Mr. Melling, the manager of the Airline Burger King outlet. Because of the lateness of the hour and in order to accommodate Mr. Melling, the deposition was recessed, to be rescheduled on a date convenient to all counsel involved.

After being adjourned October 26, 1986, Mr. Melling's deposition was rescheduled for January 19, 1987, and then again for February 13, 1987. On each occasion, the deposition was continued at the request of counsel for Burger King, because of Mr. Melling's inability to attend per counsel's written advice. The deposition of Mr. Melling was again scheduled on March 25, 1987. On March 24, 25, and 26 undersigned counsel was involved in discovery in Houston, Texas, in the matter entitled *Martin v. Volkswagen of America, et al.*, a case tried beginning April 28, 1987 for approximately six weeks in Houston. The Martin depositions were pursuant to Court order; therefore it was necessary that Plaintiff secure a refixing of Mr. Melling's deposition. Burger King expressed no opposition to that request.
The deposition of Mr. Melling was again scheduled for April 13, 1987 but did not go forward, most likely as a consequence of undersigned counsel's presence in Houston on April 11 and 12 (Saturday and Sunday) because of other *Martin* depositions, a trial before the Civil District Court for

the Parish of Orleans on April 14, and a series of meetings in Washington, D.C., beginning on the evening of the April 15 through the 17th with *Martin* experts in preparation for the imminent trial. Again, Burger King expressed no opposition.

The deposition was then rescheduled for June 30, 1987, to accompany another deposition, but continued because of Mr. Bibeau's heart attack. As a consequence, it was decided by all counsel, including Burger King's counsel, that it was imprudent to go forward with Mr. Melling's comparatively brief deposition; we would simply await the opportunity to do a whole series of depositions and allocate an entire day, making counsels' time that much more productive.

About the first of August, 1987, counsel for Plaintiff attempted to reschedule the deposition of Mr. & Mrs. Bibeau, as well as that of Karl Melling. Initially, September 16 was suggested, but rejected by counsel for Mr. Bibeau. Thereafter, it was determined that December 7 was the next available date convenient to all trial counsel, the intended schedule being to depose Mr. Melling, then Mr. & Mrs. Bibeau, and, with time permitting, Ms. Allard. Prior to the hearing in November, 1987, the deposition of Mr. Melling was renoticed as of December 7, 1987, again, the first available date on which all counsel were available.

All of the foregoing was called to the Trial Court's attention by way of memoranda and oral argument in November, 1987. The Court took the matter under submission, though with the understanding that counsel would supplement its opposition to the Motion for Summary Judgment following the December 7, 1987 deposition of Mr. Melling. It was of critical importance that the deposition of Mr. Melling be completed before moving on to corporate discovery, so that Mr. Melling, the store manager and person responsible for security at the outlet, would not be educated

by Plaintiff's discovery as to corporate security policies. This scheduling was particularly important, since in Part 1 of Mr. Melling's deposition, he testified that the only training he received prior to joining Burger King as assistant manager and later manager, of the Airline store, was in:

> ". . .what to do if you get held up, what reaction you should have if somebody sticks a gun in your face, you know, give them the money, let them go." (Exhibit , October 6, 1986, p. 37).

On December 7, 1987, counsel for Plaintiff was advised that Mr. Melling would not attend. Counsel for Burger King chose not to participate in any of the other depositions scheduled December 7. The Burger King defendants now seek to accuse Plaintiff of delay, an accusation clearly unrealistic under the above facts.

In February 1988, after having again explained the foregoing, Plaintiff argued that the Trial Court's December, 1987 Judgment reading:

> "As to the claim of Plaintiff that he wants further discovery, no discovery concerning Burger King's liability has been conducted since October, 1986. The action occurred in 1984; suit was filed in 1985; the Plaintiff has had three and a half years to investigate this case. . ."

was in error, inappropriate, and factually incorrect, because discovery had in fact taken place. The Court recognized and corrected this error in February, 1988 by its silence on the false issue of delay. If in fact there was any concern in the mind of the Trial Judge, he certainly would have at least mentioned that concern. Instead, the Trial Court correctly understood in February that despite its commentary in

December, in actual fact it had not given Plaintiff a fair opportunity to proceed with discovery. If the Court had truly been concerned about delays in February, 1988, it could well have barred further discovery on that basis. It chose not to do so.

And if Plaintiff was not chargeable with delay in February, how then could there be any charge of delay in May, 1988? Between February and May, extensive discovery was begun, most of which was completed. All discovery initiated during this period would have been completed, but for the failure of the Defendants to respond adequately and legally to that discovery. However, extensive discovery had already taken place by December, 1987.

2. **Extensive discovery had been completed as of December, 1987.**

Discovery in these proceedings effectively began October, 1985, after issue was joined and all defendants served. Since that time, extensive discovery has taken place. More particularly, by December 12, 1987, several series of interrogatories and requests for production of documents had been served and answered. Approximately twenty depositions had been taken, including the depositions of Mark Bibeau and David Schroeder, Cyrilla Allard and her four companions, Ms. Allard, and Mr. & Mrs. Bibeau. The depositions of Mr. & Mrs. Schroeder and the truck's previous owner had also been completed. All known employees of the Burger King outlet on duty on the day of the incident had been deposed, with one important deposition, Mr. Melling's, still incomplete.

The deposition of Karl Melling was begun October, 1986 following several other depositions taken that day, and adjourned, because of the lateness of the hour, to be reset. Thereafter it was:

a) Continued because of Defendants' non-appearance, three times.

b) Continued because of Plaintiff's counsel's trial pre-trial commitments, twice.

c) Continued because of illness, with all parties in agreement, once.

d) Continued because of the unavailability of Mr. Bibeau's counsel, once. (Exhibit 15, Transcript, beginning at lines 18, p.4).

The last continuance, December 7, 1988, was caused by Mr. Melling's failure to attend. This schedule is not even remotely suggestive of neglect on the part of Plaintiff's counsel.

It is clear from a reading of the transcript of May, 1988 (Exhibit 17) that the Trial Court granted Plaintiff's Application for New Trial on the basis of the Trial Court's lack of "abiding confidence" in the wisdom of its original Judgment in the face of some fifty-eight calls for service to the Burger King Airline outlet, as documented by the Jefferson Parish Sheriff's Office records. It is an unfair characterization of the Trial Court's May, 1988 ruling to suggest that the grounds for the Court's decision lay in an intention " . . . to protect the client from the inactions of her attorney." The Trial Court did not declare that to be its intention. Quite the contrary, the single and only motivation as expressed by the Trial Court is at page 33, which reads:

> "I'm going to grant the motion for new trial in this case because if this Court does not have an abiding confidence in its own judgment I cannot ask a reviewing Court to have an abiding confidence in my ruling."

Yet at page 32 of the May transcript, the Trial Court stated:

> "But, my most genuine concern was that apparently three and a half years have elapsed before any depositions or serious investigations were done in this case. It's only now that any degree of discovery of any significance has occurred."

Obviously, the Trial Court was in error. Twenty-plus deposition transcripts, several feet thick, had been generated. Serious investigation had been done. The Trial Court was in error in dismissing extensive work as not being "significant," simply because it found such work not to be persuasive.

The Trial Court then went on to say:

> "I have some problem with that, but at the same time it is not my purpose in life to penalize the party for that lack of activity on behalf of Counsel. Further, it is not my purpose to find a deep pocket when one is there, however, it is also not my purpose to exclude the potentiality of judgment if it can occur. In summary judgment I am basically called upon to determine if there is any issue in dispute upon which reasonably minds can basically look at."

The term "some problem" is nowhere near an accusation, much less indicative of a finding of neglect by the Trial Judge. For there is no "lack of activity." That statement is clearly inaccurate. The Trial Judge focused only on what had occurred in the last sixty days before the hearing in May (for that material was what he considered significant) while, at the same time, losing sight of all the efforts, all the depositions, all the interrogatories completed before that sixty day period (for that material was what he considered

not significant). Clearly, though the Trial Court's comments on delay may be seen as reflecting its impression of the significance of previous discovery (an impression in which it substitutes its own judgment for that of a finder of fact), they are manifestly inaccurate when the actual extent of previous discovery is considered.

Following the May, 1988 decision by the Trial Court, the Court of Appeals for the Fifth Circuit, in the space of five (5) days, on the basis of an incomplete record, reversed that decision. The Appellate Court erred initially in mischaracterizing the Trial Court's motivation for granting a new trial, but recognized its error on rehearing, and reversed itself. Nor, all material being considered, including the Trial Court's expressed motivation for its May decision--a lack of "abiding confidence" in its previous judgment--did the Appellate Court voice any concern regarding the false issue of "delay."

Plaintiff submits then, that in the light of the entire record, no "delay" in discovery such as to permit a grant for Summary Judgment in defendant's favor can justly be chargeable to her. Nor should this Court find at all persuasive any of defendants' misplaced reliance on any commentary regarding delay. In fact, the real complaint of Burger King is that neither the Trial Court nor the Appellate Court ruled dispositively as the defendants anticipated. Thus the real question is, are there material facts at issue such as to preclude summary judgment? The answer is, certainly, yes. Given a dispute as to material facts, summary judgment in favor of Burger King is inappropriate and clearly wrong.

3. **It is obvious from the entire record that even as of November, 1987 there were issues of material fact in dispute that should have precluded the Summary Judgment granted in December.**

The factual narrative set forth by Plaintiff clearly demonstrates a violent, threatening confrontation on the Burger King premises in an unsupervised and unpatrolled area. Plaintiff demonstrates that Defendants afforded these children no security other than that provided by a haphazard, catch-as-catch-can, cleanliness inspection. Defendants, however, in sharp contrast, describe an incident lasting no more than five minutes, relatively low-key, and insufficient to attract the attention of Burger King employees (Exhibits 6, 7).

Clearly, the events that occurred in the unsupervised Burger King parking lot are readily susceptible of contrasting interpretations. On one hand, Defendants cite selected portions of several depositions and argue that the "incident" was nothing more than a "minor" confrontation between teenagers. On the other hand, Plaintiff demonstrates, by deposition reference, that the man and young boy were "drunk or loaded," had physically abused a neighbor's dog, and had threatened sexual assault with sufficient aggression so as to attract the attention of both the dog's owner and the adjoining neighbors. These narratives are mutually exclusive. The presentation of this factual material dispute should have been enough to preclude the summary judgment granted in December, since fact findings are for the jury. However, in its December Judgment, the Trial Court made findings of fact:

> "The encounter on the parking lot was relatively brief. It is unreasonable to find that a security guard, or another Burger King employee, who might have observed this encounter, should have thought that these girls and James Allard were in any danger. The brief exchange of harsh words in the parking lot ended with the parties going their separate ways."

Thus the Trial Court improperly exercised the function of a jury as a basis for its December, 1987 grant of summary judgment, and properly reversed itself in May.

A further issue of material fact was presented in November regarding the security precautions at the Airline outlet, as they differ sharply from those at other Burger King, locations. The completion of the deposition of Karl Melling, the manager of the Airline Burger King, was significant, because Mr. Melling was the last scene witness who could describe in detail the security precautions, if any, taken by Burger King with respect to its Airline Highway outlet. For as of November, 1987, it was clear from discovery including the beginning of Mr. Melling's deposition, that the owners and operators of the Airline Burger King store did nothing to patrol, monitor or observe the northeast corner of their premises, consisting of the parking lot and pay telephone areas during daylight hours. This area was extensively used by patrons, but totally unobservable from the interior of the premises. No mirrors, no speaker system, no camera, nor any other device was used by virtue of which Burger King employees could know what was occurring within the rear parking lot in which the pay telephones were placed.

Mr. Melling had testified that at no time prior to the incident was a loss control manual in existence, and there was nothing within the operation manual relative to security and loss prevention. Also, under operating procedures in effect at the time of the incident, the only attention paid to the rear parking area was a haphazard, catch-as-catch-can tour of the parking lot (Exhibit 8, p. 47 et. seq.). Further, during the Chart House operation of the Burger King outlet, there was neither director of security nor loss prevention officer, nor loss control officer nor anyone else holding a title indicative of someone having responsibility for security within the franchise operation. Mr. Melling indicated that during the entire time of his management at the Airline

store, he could not recall any group or individual touring the premises and discussing security (Exhibit 8, p. 46). At one time security measures were implemented so as to protect money, but not patrons. Never was a security guard otherwise retained to patrol the Burger King Airline outlet.

This practice is in contrast to that at other New Orleans and Jefferson Parish Burger King locations, where security has been provided. At the Burger King Carrollton outlet, security personnel were employed for the specific purpose of patrolling both the interior and exterior of the premises, keeping good order and intervening when patrons became boisterous. In fact, the Trial Court's courtroom deputy indicated that he had served as an off-duty security officer at the Avondale Burger King outlet. That was a "very quiet" store and he saw no real need for his presence, but he was nevertheless retained by Burger King. Numerous other stores provided security as well.

It is clear then from the foregoing that by the time the Summary Judgment herein filed by the Burger King interests was heard in November 1987, there were significant issues of material fact in existence which precluded summary judgment (Exhibits 9 and 10). On this basis alone, the final rulings of the Trial Court and Appellate Court denying Summary Judgment should be affirmed.

C. THE FINAL DECISIONS OF THE COURTS BELOW SHOULD BE AFFIRMED ON REHEARING.

The Trial Court and the Court of Appeal, Fifth Circuit, each have correctly ruled that a dismissal by summary judgment of the Burger King defendants herein is improper and unwarranted. Nothing in the record suggests that either the Trial Court or the Appellate Court committed error, much less reversible error. Exercising each its respective discretion, both the Trial and Appellate Courts correctly

understood that summary judgment was inappropriate in this most serious tort action, because discovery was incomplete and because material facts at issue preclude summary judgment. The Burger King defendants complain that issues of material fact were created by improperly considered evidence. Once the entire Trial Court proceedings are understood, however, it is clear that the Trial Court properly considered the evidence and that there was no limitation on the ability of the Court to receive, much less to consider, this information. The key is to understand the posture of the litigation and the ruling of the Trial Court in February, 1988.

On February 2, 1988, the Trial Court heard the Motion for New Trial, filed by Plaintiff after a premature grant of summary judgment in favor of the Burger King defendants. The fact that summary judgment had been granted before the completion of even the second tier of discovery caused the Trial Court to realize its error in the previous grant of summary judgment:

THE COURT:

> "Let me stop you for a moment.
>
> "I can understand your feelings on some of the verbiage that we may have used in the judgment, but however, I think you're overly interpreting some of my verbiage. Be that as it may, **I was unaware of Mr. Melling's deposition being kind of left opened in your first hearing**. Transcript, February 2, 1988 hearing (emphasis added) (Exhibit 15).

At the time of the Trial Court's realization, Plaintiff's Motion for New Trial was under consideration. The Plaintiff had argued that with discovery incomplete, the Trial Court could not reach a definitive conclusion as to the existence of

material facts in dispute. The Trial Court then outlined alternatives to cure this defect.

> There are several alternatives to cure this. One, I can keep this motion for new trial open and allow you to complete that discovery deposition and if there is something in there that you feel you should add to your motion for new trial, I will let you do that. That's one alternative.
>
> "The other alternative is that I can grant your motion for new trial and set discovery aside or deny it and not set it aside. It would seem to me the more palatable solution is to allow you to finish Mr. Melling's deposition, supplement your motion for new trial with anything you believe that adds to the situation. **That is the only palatable alternative I see without having to re-file motions for summary judgment. I do want to see what this man has to say. I agree with you. I was unaware that he was not finished**.
>
> "So, basically unless there is something further you want to add, my feelings are to allow Mr. Melling's deposition and I'll keep this as open motion for new trial, you have interrupted any period of time, and you can supplement your motion for new trial with anything you think the deposition added. It is not critical whether it will offer anything in this case that will substantially change my opinion. **I need to let you finish it**. That basically is the posture I'm going to keep this case in, gentlemen. I'm going to keep the motion for new trial open, allow you to complete the deposition within 60 days from today's date. That certainly should be enough time to complete it. If you complete it before that time supplement your motion. I will give you another hearing date within

ten days to file and we will take it up at that point in time to conclusion. That's all I can do. I don't want to set it aside. **I don't want to arbitrarily deny it without Mr. Melling's input. He may have something there that will substantially change my opinion**.

MR. DUDENHEFER:

"We had contemplated at the conclusion of Mr. Melling's deposition, - he made reference and alludes to manuals, operations and things along those lines which will be **the motion for production of documents**.

THE COURT:

"**File a motion to produce**. He is an agent of Burger King; is he not? He can produce it." (Transcript, February 2, 1988, Exhibit 15 emphasis added).

Plaintiff-Respondent's interpretation of the Court's ruling on February 2, 1988 is that discovery was reopened without limitation. If that is true, then there is no question but that the Trial Court properly considered those fifty plus police service calls and found them persuasive that summary judgment should not issue. Obviously, the Trial Court's intention in holding the Motion for New Trial open and allowing discovery to proceed was to consider all new evidence generated as a result of that discovery. At the request of the Burger King Defendants the Trial Court chose this alternative, relieving the Burger King Defendants of the necessity of refiling, rebriefing, and rearguing their Motion for Summary Judgment. On the other hand, assuming any limitation on discovery, the fifty plus sheriff's assistance calls were not offered to the Trial Court in a vacuum, but were included as impeachment materials disclosed during the completion of the deposition of Karl Melling, unquestionably

permitted by the ruling of the Trial Court in February, 1988, with defense counsel expressly concurring. If the deposition of Karl Melling was authorized, and it was, then certainly this impeachment material was properly considered by the Court.

1. **The records of service calls were properly withheld as impeachment materials.**

During the period of court-permitted discovery Mr. Melling was confronted and thus impeached as a result of fifty-eight calls for service that were reported by the Jefferson Parish Sheriff's Department at 3735 Airline Highway., the Burger King location, between 1980 and April, 1984. In 13.8% of those fifty-eight incidents, an arrest was effected. A complete listing of the JPSO records regarding this period is found at Exhibit 29.

As impeachment materials they could only be used upon the resumption of Mr. Melling's deposition. What the defendant calls "newly discovered information" is in reality impeachment material which could not earlier be disclosed without the resumption of Mr. Melling's deposition. This material argues forcefully that summary judgment has been and remains inappropriate.

The preliminary report (Exhibit 30) of the Kent Agency issued at the request of Plaintiff discloses the following:

> After evaluating those 58 calls for assistance, which included police response to armed robberies, aggravated battery, theft, fighting, disturbing the peace, simple battery, sex crimes, and suspicious persons at the Burger King outlet on Airline Hwy. and scene inspections of the Burger King premises and three other similar operations, i.e. McKenzie's,

> Texaco and Church's Chicken, the former Assistant Superintendent of the New Orleans Police Department finds that the pay phone to the rear of premises are not visible from the street. That while there is excellent frontal visibility, that is negated by the almost hidden reaches behind the Burger King restaurant. The entire rear area is obscured from public view and there is no apparent means whereby personnel on the inside could inspect the outside/rear of the restaurant.

The preliminary report further states:

> "Absent any showing to the contrary, Burger King management must have been aware that their site was the source of numerous calls for assistance to local law enforcement service providers. Police action taken at or around their facility [prior to April 1984] provided ample notice that disorderly conduct was prevalent, and that measures were necessary to confront the problem."

Again at page 6 it is noted that "backside visibility is most deficient at 3735 Airline Highway." At page 5, the writer notes:

> "Consummate opportunities exist at the rear of Burger King, and a store with a high volume numbers of police complaints like this one would be well served to rethink its safety, accident and waste and crime risk program."

In the report's conclusion, it is noted that security and the state of safety for both employees and customers was inadequate and that management failed to avail themselves of creative and reasonable options to reduce the

risk of potential accident and/or crime victimization. The key finding of the report is that:

> "A condition, or state, of security neglect prevails at this business because a reasonable standard of care has been ignored by Burger King and remains so at this writing."

Mr. Kent specifically states that the sole security precaution taken, the infrequent tour of the parking lot area by the manager, is not reasonable and is inadequate given the environment, i.e. the area, the Burger King outlet, and its crime history. Those fifty-eight service calls by the Sheriff's Office, with a single exception known to Mr. Melling, created in the mind of the Court an abiding lack of confidence in the wisdom of its earlier ruling.

Certainly, had the service calls been earlier disclosed, Mr. Melling would have been much more knowledgeable. He would have been educated before his testimony could be recorded. Instead he was properly impeached. The Court's February ruling, the Defendants' approval, and the impeachment nature of these materials move these materials outside the scope of Article 1972 (see discussion below).

2. **The basis of the Trial Court's May, 1988 decision was the properly submitted evidence of the service calls, and that evidence was properly considered by the Appellate Court on rehearing.**

The Court in May, 1988 concluded that considering the evidence of the service calls described at length, supra, it had a lack of abiding confidence in its own previous grant of summary judgment in December, 1987, and could not expect a reviewing court to have confidence in that previous judgment.

The Trial Court gave no other motivation whatsoever for its decision in May, 1988 (Transcript, May 1988 hearing). The evidence on which the Trial Court based its decision and on which the Appellate Court affirmed consisted of the very documents that defendants now choose to characterize as improperly submitted.

First, the Burger King defendants did not object when in February 1988 the Trial Court fashioned its discovery and evidence submission plan. Only now do the Burger King defendants complain of the results of that discovery. Second, counsel for Burger King expressly concurred in the completion of Mr. Melling's deposition (Transcript, May 1988). The records of the service calls were attached as Exhibits to that very deposition. And finally, those records were before the Trial Court, and thus the Appellate Court, with all propriety. They were attached as Exhibits to the deposition of Mr. Melling completed in March, and that deposition was submitted in supplemental briefing to the Trial Court (Exhibits 13 and 28). Further, no deadlines for briefing or for submission of evidence had been set by the Trial Court. Therefore, the defendants' allegations that such evidence was improperly before the Trial and Appellate Courts seem facetious at best. This Court should certainly not consider those allegations persuasive.

3. **La. C.C.P. Article 1972 does not apply to the instant case.**

When the Trial Court realized in February, 1988 that the deposition of Mr. Melling had not in fact been completed, it set forth several alternatives to cure the defect:

1) Grant the Motion for new trial, thus allowing discovery to proceed, but requiring the refiling of summary judgment Motions of some later time;

2) Deny the Motion for new trial;

3) Keep the Motion for new trial open and allow completion of discovery, by so doing relieving the Plaintiff of any limitation provided by Article 1972, La. Code of Civil Procedure.

The Trial Court elected the latter alternative. Based on this choice, defendants argue that La. Code of Civil Procedure Article 1972 applies. However, the Trial Court's intention was to "cure" (its own words) the defect created by its confessed lack of knowledge of open discovery when the Motion for Summary Judgment was granted in December 1987. No one could seriously argue that Article 1972 applies in the situation of a pending Motion for Summary Judgment when discovery is in fact open. Nor could anyone argue that Article 1972 would apply had a Motion for New Trial been granted, because the evidence elicited from Mr. Melling was not elicited previously, through no fault attributable to Plaintiff's counsel. In this unique context, this Court should not consider Article 1972 as a bar to the reception of all materials generated through May, 1988, by the Trial Court. Moreover, Plaintiff submits that it was the reaction of Burger King Airline management to the fact of fifty-eight police service calls at the facility that it was significant to elicit, and that could be done only by continuing to depose Mr. Melling.

True, as the Trial Court observed, if the Motion for New Trial was granted, Motions for Summary Judgment would have to be refiled. However, only the procedural hybrid created by the Trial Court's attempt to avoid that duplication of effort allows the false application of Article 1972.

The Court, with the approval of the Defendants, chose to maintain the then posture of the case. The Trial Court considered the matter under submission pending

further discovery. Certainly if a trial court has the authority to grant a new trial conditionally as an alternative to additur or remitter, the Trial Court has the discretion to deny a New Trial conditionally pending discovery Summary Judgment motion. That is all that was done by the Trial Court in February, 1988. It is within the sound discretion of a Trial Judge to permit additional discovery, without holding Plaintiff to an Article 1972 standard, in circumstances such as these.

The Trial Judge could have granted Plaintiff's Motion for New Trial. The effect would have been that discovery would have proceeded as it in fact did, and that upon reurging of the Motion, the Trial Court would then have denied the defendant's refiled Motion for Summary Judgment the very same reason: the existence of fifty-eight police service calls to the Airline outlet, all outside the knowledge of the person responsible, Karl Melling, was sufficient to create an issue regarding a security risk on which reasonable minds might differ.

As an alternative, with the approval and thus at the election of the Defendants, the Court took the matter under consideration pending discovery. It would consider all information without reference to Article 1972, thereby conserving the time and resources of the Trial Court and the parties involved. In this unique context, the Trial Court had the inherent discretion to receive material in support of the application for the new trial without reference to Article 1972. The Defendants without protest in February 1988 accepted the risks inherent in submission of newly discovered or disclosed material following completion of the discovery phase, without a showing of conformity to Article 1972. The Trial Court's discretion as well as the Defendants' election, should pretermit any discussion of Article 1972.

For defense counsel certainly did not object to the discovery procedure adopted by the Trial Court in February 1988. Their procedural attack now is unfounded, and a

disguise for their real complaint, the results of that discovery. Defendants agreed that Plaintiff was entitled to the deposition of Mr. Melling. They made no objection to the Trial Court's procedural innovation. They cannot now use it to their advantage to attack the substantive content of Mr. Melling's testimony. Surely, the defendants cannot show that the Trial Court erred in concluding in May, 1988 that disputed material facts existed on which reasonable minds might differ. The Trial Court's decision that there is a dispute as to material facts is manifestly correct, as is the Appellate Court's affirmation.

D. FURTHER DISCOVERY IS REQUIRED ON A CORPORATE LEVEL IN THIS MOST SERIOUS TORT ACTION AND THE FACT OF THAT OUTSTANDING DISCOVERY SHOULD ITSELF PRECLUDE SUMMARY JUDGMENT.

There is no question that the law of the State of Louisiana requires the owner of a business to assume the affirmative duty to "exercise reasonable care to protect those who enter." *Ferrington v. McDaniel*, 336 So.2d 796 (La. 1976).

But Mr. Melling's continued deposition in March 1988, as well as his initial deposition in October 1986, demonstrates that minimum security precautions were taken, on their face clearly insufficient, ineffective, and therefore below the legal standards required, i.e. "to exercise reasonable care to protect those who entered." *Ferrington*, *supra*.

At page 82 upon the resumption of his deposition in March, 1988, Mr. Melling testified as follows:

"Question: You agree with me that you have an obligation for the safety of people about the premise of Burger King; do you not?[1]

Answer: Yes.

Question: And that would include employees and customers?

Answer: Yes, Sir.

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Question: My question is: What on April the 14th, 1984 did Burger King do to protect customer safety in the parking area about the pay phone?

Answer: I don't know how I could answer that because I don't know what that's pertaining to. That day there, I don't believe I was even there.

Question: Let me ask you this: In April of 1984 you were the store manager. You were the man ultimately in charge; is that correct?

Answer: Yes.

[1] Premises include parking lots. Landry v. St. Charles Inn, 446 So.2d 1246 (La. App. 4th Circuit, 1984).

Question: What was done by Burger King to protect the safety of patrons using the pay telephone in the parking lot?

Answer: Nothing that we normally didn't do before.

Question: And what did you normally do before besides the intermittent manager tour?

Answer: That's what we did, tours.

Question: Tours.

Answer: That's what I say, we do tours. That would be the only way we would know anything would be going on.

Question: And that was time permitted? Not on a regular schedule?

Answer: Yes." (Exhibit 28, p. 82)

It is clear therefore that the Burger King defendants understood that they had an obligation to protect people on the premises, including the rear store area; that Mr. Melling provided the only security available at that store on a catch-as-can basis, at infrequent intervals. It cannot be said that Burger King, as a matter of law, satisfied its duty to provide protection to those lawfully about the premises.

The following testimony of Mr. Melling in March, 1988 clearly indicates that had management known, as Plaintiff contends management should have known, of the threatening incident involving James Allard, management would have intervened and protected the children:

"QUESTION: Let me ask you this: What would you do if there was a 21 year old directed to a 13 year old the comment - - and I apologize--I'll fuck you good, in a threatening way?

MR. ANGELLE

This is still inside at the counter?

MR. DUDENHEFER:

Inside, in a threatening way. What would you do?

THE WITNESS:

I would still tell them he would have to leave the store if he used that kind of language.

Question: Would you consider making him leave and keeping the 13 year old at the premises until he left? Would you consider taking that kind of action if you heard the comments and considered them to be threatening enough?

Answer: If he felt he was threatened, yes.

Question: You mean if you felt the customer was threatened?

Answer: No, if he felt he was threatened.

MR. ANGELLE:

Who are you referring to when you say that?

THE WITNESS:

The 13 year old.

MR. DUDENHEFER:

I am talking about a 13 year old girl.

THE WITNESS:

Or she. If she thought she was threatened.

EXAMINATION BY MR. DUDENHEFER:

Question: In other words, you would investigate and you would stop the obscenities and you would try and get the adult on his way and get her to stay?

Answer: Yes.

Question: To make sure that that incident settled down and it didn't spill over someplace else?

Answer: Yes." (Exhibit 28, p. 87)

Plaintiff demonstrated in November, 1987, and again in May, 1988, that there are material facts at issue requiring completion of the third level of discovery, that is, discovery on a corporate level, which discovery has begun and is resently proceeding.

It is clear from the questions raised by discovery to this date that discovery in this most serious tort action is incomplete and that therefore, there exist material facts not yet discovered upon which this litigation further turns. For examples:

1) What was the nature and extent of security information made available by the franchisor, Burger King Corporation to the franchisee, Chart House, Inc. and Diversified Foods, Inc.?

2) What safety audits were made by Burger King Corporation and others, i.e. insurers?

3) What requirements were made by Burger King Corporation with respect to surveillance of the menu board, drive thru lane, and/or the rear area of stores similarly configured to that of the Airline Highway outlet? For example, by directive dated 11/1/85, Burger King required that mirrors be in place so as to "increase awareness of customers at the order station and in drive-thru line." (Exhibit 31; this is the area about the premises where the first series of assaults occurred).

4) What training materials were furnished Karl Melling and other franchisee personnel during the course of training at Burger King College?

5) What surveys were made by Business Sounds, Inc. with respect to T.V. camera monitoring, sound systems, and/or other devices to monitor the order station, the drive thru and/or the rear of the premises?

It could well have been that had Mr. Melling been knowledgeable with respect to these questions, additional

discovery would not be needed. But this information was not supplied by Mr. Melling or by Burger King (Exhibits 18 through 25) within the sixty day window of court-ordered discovery (Exhibits 26, 29). Had full answers and responses been supplied by Burger King within this sixty day period, discovery would now be complete. Further, it may well be that the information Plaintiff presently seeks will indicate corporate-level security requirements not implemented at the Airline Highway outlet. Particularly in view of the different policies regarding security guards at different Burger King outlets, Plaintiff should be permitted to obtain this information. On the basis of this incomplete discovery alone, alone, Summary Judgment should not be granted.

IV. CONCLUSION

This Court has, on defendants' writ application only, reversed the final holdings of the Trial and Appellate Courts that defendant's Motion for Summary Judgment should be denied. In so doing this Court has exercised its supervisory jurisdiction in such a way as to reverse the law and the jurisprudence of this state. Plaintiff submits that a rehearing should be granted.

Plaintiff has demonstrated that there are genuine issues of material fact that preclude Summary Judgment in this case. Further, these issues were substantiated by properly introduced evidence, to which no La. C.C.P. Art. 1972 standard should apply. The evidence was used properly for impeachment and properly attached to the deposition of a witness. That deposition was part of supplemental pleadings properly before the Trial, and thus the Appellate Courts. The allegations of defendant that this evidence was newly discovered or that Plaintiff delayed in discovering it should certainly not be considered as anything but an attempt to evade addressing the merits of that evidence, for these allegations are not well founded. Finally, discovery to date has raised questions in this most serious tort case, involving severe and permanently disabling injury to a four year old child, that only further discovery can answer.

Counsel for Plaintiff submits that in this brief excellent reasons have been set forth why this Court's opinion should be reversed, but would add that this opinion was rendered without expansive briefing or oral argument, both or either of which may be helpful to this Court at the Court's discretion. However, for the reasons discussed above, Plaintiff urges that this Court grant a rehearing, and deny defendants Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this _____ day of December, 1988 served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same first class mail, postage paid and properly addressed.

/s/ FRANK C. DUDENHEFER, JR.
Frank C. Dudenhefer, Jr.